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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VICTOR N.,	)	2 CA-JV 2010-0121
	)	DEPARTMENT B
Appellant,	)	
	)	MEMORANDUM DECISION
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ANA P. and VICTORIA N.,	)	Appellate Procedure
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. S191097

Honorable Karen S. Adam, Judge Pro Tempore

AFFIRMED

Child Advocacy Clinic
By Paul D. Bennett, a clinical professor appearing under Rule 38(d), Ariz. R. Sup. Ct., and Ashley Brick and Ellen Aiken, students certified pursuant to Rule 38(d), Ariz. R. Sup. Ct.
Tucson
Attorneys for Appellant

Nuccio & Shirly, P.C.
By Jeanne Shirly
Tucson
Attorneys for Appellee Victoria N.

E C K E R S T R O M, Judge.

¶1 Victor N. challenges the juvenile court's September 2010 order terminating his parental rights to his daughter, Victoria N., born in March 2000, based on abandonment. *See* A.R.S. § 8-533(B)(1). He argues that there was insufficient evidence that termination was in Victoria's best interests and that the court erred by failing to consider factors enumerated in *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, 995 P.2d 682 (2000), because Victor's incarceration was "central[]" to the proceeding. He additionally asserts that we should require a parent who petitions for the termination of the other parent's rights to have "taken affirmative steps to preserve the relationship between the child and the other parent" before seeking termination and that Victoria's mother, Ana P., failed to take those steps here. We affirm.

¶2 We view the evidence in the light most favorable to upholding the juvenile court's order. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). Ana and Victor began a romantic relationship in 1998 and lived together for six to eight weeks following Victoria's birth in 2000. Victor was then incarcerated for over three years, but was released in December 2003, after his convictions were vacated. During Victor's incarceration, he exchanged cards and letters with Ana and Victoria. Following his release, he lived with Ana and Victoria for about six months, after which the couple separated. Over the next five years, he provided sporadic financial support and saw Victoria "about once a month," although he sometimes "wouldn't show up" despite having told Ana he would do so.

¶3 In May 2008, Victoria called 9-1-1 because, during an argument with Ana, Victor had "kicked in" a television set. After that incident, although Victor called Ana once, he did not visit Victoria or have any communication with her. In late 2008, Victor was incarcerated following his convictions for felony drug offenses. He made no effort to contact his daughter during his incarceration, despite having the telephone number and address of Ana's parents. He testified at the severance hearing that he would be released from prison in November 2010.

¶4 In June 2009, Ana filed a petition to terminate Victor's parental rights, and she amended the petition several months later to allege the ground of abandonment. She asserted that termination was in Victoria's best interests because Ana's husband, whom she had married in May 2009, wanted to adopt Victoria. After a contested severance hearing, the court ordered that Victor's rights be terminated, finding Victor had abandoned Victoria and termination was in Victoria's best interests.

¶5 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and "shall also consider the best interests of the child." *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the child's best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 42, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by

the applicable evidentiary standard. *Denise R.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d at 1265-66.

¶6 Victor first asserts there was insufficient evidence that termination was in Victoria's best interests because there was no evidence her stepfather's planned adoption of Victoria would benefit her or that a continuing relationship with Victor would harm her. For termination to be in Victoria's best interests, the evidence must support a conclusion that she would benefit from the termination of Victor's parental rights or be harmed by the continuation of the relationship. *See In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). There is ample evidence here that Victoria would benefit from termination of Victor's parental rights. The fact that her stepfather is willing to adopt her and that he is currently participating in parenting her is sufficient even standing alone.[1] *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz.

[1]Victor relies on *In re Maricopa County Juvenile Action No. JS-9104*, 183 Ariz. 455, 904 P.2d 1279 (App. 1995), for the proposition that Victoria's stepfather's willingness to adopt her does not support a finding that severance would be in her best interests. The court there stated the fact that a stepparent is willing and able to adopt a child "is not conclusive grounds for severance." *Id.* at 461, 904 P.2d at 1285. We agree that, in the absence of a statutory ground for severance, a willing adoptive parent is immaterial. *See Maricopa County No. JS-500274*, 167 Ariz. at 5, 804 P.2d at 734 (best interests determination alone not sufficient to grant termination). But Victor is incorrect to the extent he suggests the existence of a willing adoptive parent cannot be a sufficient ground to find that severance is in a child's best interests—the issue currently before us. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004). Further, as our supreme court has explained, the court in *Maricopa County No. JS-9104* incorrectly required a party petitioning for the termination of a parent's rights to prove termination was in the child's best interest by clear and convincing evidence instead of by a preponderance of the evidence. *Kent K.*, 210 Ariz. 279, ¶¶ 12, 22, 110 P.3d at 1016, 1018.

43, ¶ 19, 83 P.3d 43, 50 (App. 2004) (evidence child adoptable and current placement meeting child's needs sufficient to find termination in child's best interest).

¶7 Moreover, the presence of a statutory ground for termination typically will "have a negative effect on the children," therefore supporting a juvenile court's best-interests finding. *In re Maricopa County Juv. Action No. JS-6831*, 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988). As noted, there was ample evidence Victor had abandoned his daughter. Additionally, Ana testified that Victoria's adoption by her stepfather would provide Victoria stability and security should Ana no longer be able to parent Victoria. We disagree with Victor's suggestion that this was insufficient evidence of a benefit to Victoria—stability is plainly relevant to a child's best interest. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 15, 53 P.3d 203, 207 (App. 2002) (stability of current placement relevant to best-interests determination). Nor is Victor correct that there was no evidence Victoria wanted to be adopted—a social study authored by a "severance consultant" noted that Victoria wanted her stepfather to adopt her. That study was admitted into evidence without objection. *See Starkins v. Bateman*, 150 Ariz. 537, 544, 724 P.2d 1206, 1213 (App. 1986) ("[I]f hearsay evidence is admitted without objection it becomes competent evidence admissible for all purposes."); *see also Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 24, 158 P.3d 225, 232 (App. 2007) (failure to object to exhibits at trial waives issue on appeal). Finally, we reject Victor's contention that the juvenile court "gave no weight" to his "consistent contact with Victoria during the five years before his [2008] incarceration." Nothing in the record

suggests the court ignored that evidence, and we presume it considered all evidence presented. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (appellate court presumes trial court considered evidence presented); *In re Maricopa County Juv. Action No. JS-3594*, 133 Ariz. 582, 585, 653 P.2d 39, 42 (App. 1982) ("In reviewing the evidence, we are mindful of the fact that the trial court will be deemed to have made every finding necessary to support the judgment.").

¶8 Victor next asserts that the juvenile court erred because it did not consider the factors enumerated in *Michael J.* and, had the court considered those factors, it would have found Victor had not abandoned Victoria. In *Michael J.*, when discussing termination based on the length of a parent's incarceration pursuant to § 8-533(B)(4), our supreme court outlined several factors relevant to determining whether the prison sentence imposed was "sufficiently long to deprive a child of a normal home for a period of years," specifically:

> (1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.

¶9 We agree with Victoria that *Michael J.* does not mandate that a juvenile court expressly examine these factors in considering whether an incarcerated parent has

abandoned a child pursuant to § 8-533(B)(1). Indeed, the court in *Michael J.* did not apply those factors in addressing the abandonment ground, which it discussed separately before addressing § 8-533(B)(4), observing only that incarceration "neither 'provide[s] a legal defense to a claim of abandonment' nor alone justifies severance on the grounds of abandonment." 196 Ariz. 246, ¶ 22, 995 P.2d at 686, *quoting In re Pima County Juv. Action No. S-624*, 126 Ariz. 488, 490, 616 P.2d 948, 950 (App. 1980) (alteration in *Michael J.*). Thus, the court explained, "incarceration is 'merely one factor to be considered in evaluating the father's ability to perform [his] parental obligations.'" *Id.*, *quoting Pima County No. S-624*, 126 Ariz. at 490, 616 P.2d at 950 (alteration in *Michael J.*).

¶10 Nor do we agree with Victor that examination of those factors would change the result here. Several of the factors simply have no application to an abandonment analysis and are relevant only to considering whether incarceration will deprive the child of a normal home—part of the necessary analysis under § 8-533(B)(4). For example, the fact that Ana and her husband are able to provide Victoria with a stable home has no bearing on whether Victor abandoned Victoria. And, although Victor's prison sentence was relatively brief, he had virtually no contact with Victoria for nearly six months prior to his incarceration and made no effort whatsoever to reestablish that relationship while he was incarcerated. *See* A.R.S. § 8-531(1) ("Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment."); *Kenneth B. v. Tina B.*, 226 Ariz. 33,

¶ 18, 243 P.3d 636, 640 (App. 2010) (factors relevant to abandonment include whether parent made more than minimal effort to provide support and supervision and maintain contact). The evidence amply supports the juvenile court's abandonment finding.[2]

¶11 Finally, Victor argues we should require a parent who petitions for termination of the other parent's rights "to have taken affirmative steps to preserve the relationship between the child and the other parent" based on the "fundamental importance of preserving the relationship between children and their natural parents." Even if we agreed that we have authority to impose such a requirement and that it would be sensible to do so, Victor did not raise this argument in the juvenile court. We therefore decline to address it on appeal.[3] *See Trantor v. Fredrikson*, 179 Ariz. 299, 300,

[2]Victoria correctly points out that Victor recites an inapplicable standard for abandonment. He cites *Anonymous v. Anonymous*, 25 Ariz. App. 10, 12, 540 P.2d 741, 743 (1975), which stated that some jurisdictions have held abandonment to be "intentional conduct" evincing "a settled purpose" to forgo parental duties. The current standard is described in § 8-531(1), and is "measured not by a parent's subjective intent, but by the parent's conduct." *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86.

[3]We acknowledge that the doctrine of fundamental error, typically reserved for criminal matters, has been applied in a severance case to which the state was a party. *See, e.g.*, *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (defendant forfeits review of all but fundamental, prejudicial error by failing to object at trial). Even assuming fundamental error review is appropriate in this context, however, Victor has nonetheless waived this claim on appeal because he does not acknowledge that he failed to raise the argument below and does not assert we should apply fundamental error review, much less attempt to show any error was fundamental and caused him prejudice. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to allege fundamental error on appeal waives argument).

878 P.2d 657, 658 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶12 For the reasons stated, we affirm the juvenile court's order terminating Victor's parental rights to Victoria.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge